

## Department of the Army, DoD

## § 536.34

adjudicated by receiving State offices under NATO or other SOFA, will be immediately transferred to the proper agency together with notice of same to the claimant or legal representative. Where multiple federal agencies are involved, other agencies will be contacted and a lead agency established to take all actions on the claim. Where the DA is the lead agency, any final action will include other agencies. Similarly, where another agency is the lead agency, that agency will be requested to include DA in any final action. Such inclusion will prevent multiple dates for filing suit or appeal.

(b) If another agency has taken denial action on a claim that involves the DA, without informing the DA, and in which the DA desires to make a payment, the denial action may be reconsidered by the DA not later than six months from the date of mailing and payment made thereafter.

NOTE TO § 536.32: See also §§ 536.17 and 536.18; AR 27-20, paragraph 13-2; and the parallel and related discussion of this topic at DA Pam 27-162, paragraphs 1-19, 1-20, 2-13 and 13-2.

### § 536.33 Use of small claims procedures.

Small claims procedures are authorized for use whenever a claim may be settled for \$5,000 or less. These procedures are designed to save processing time and eliminate the need for most of the documentation otherwise required. These procedures are described in DA Pam 27-162, paragraphs 2-14 and 2-26.

### § 536.34 Determination of correct statute.

(a) *Consideration under more than one statute.* When Congress enacted the various claims statutes, it intended to allow federal agencies to settle meritorious claims. A claim must be considered under other statutes in this part unless one particular statute precludes the use of other statutes, whether the claim is filed on DD Form 1842 (Claim for Loss of or Damage to Personal Property Incident to Service) or SF 95. Prior to denial of an AR 27-20, chapter 11 claim, consider whether it may fall within the scope of subparts C, D, or F of this part, and where indicated, ques-

tion the claimant to determine whether the claim sounds in tort.

(b) *Exclusiveness of certain remedies.* Certain remedies exclude all others. For example, the Court of Federal Claims has exclusive jurisdiction over U.S. Constitution Fifth Amendment takings, express or implied-in-fact, as well as governmental contract losses, or intangible property losses. Claims of this nature for \$10,000 or less may be filed in a U.S. District Court. There is no administrative remedy. While the FTCA is the preemptive tort remedy in the United States, its commonwealths, territories and possessions, nevertheless, other remedies must be exhausted prior to favorable consideration under the FTCA. The FTCA does not preclude use of the MCA or the NGCA for claims arising out of noncombat activities or brought by soldiers for incident-to-service property losses sustained within the United States. See DA Pam 27-162, paragraphs 2-15a and b for a more detailed discussion of determining the correct statute for property claims versus personal injury and death claims. In addition, it is important to consider the nature of the claim, e.g., whether the claim may be medical malpractice in nature, related to postal matter, or an automobile accident. Discussions of these and many other different types of claims are also provided herein as well as in the corresponding paragraph 2-15 of DA Pam 27-162. It is also very important to consider when a claim may fall outside the jurisdiction of the Army claims system. Some of these instances are alluded to immediately above, but for a detailed discussion of related remedies see § 536.36 of this part and paragraph 2-17 of DA Pam 27-162.

(c) *Status of Forces Agreement claims.*

(1) Claims arising out of the performance of official duties in a foreign country where the United States is the sending State must be filed and processed under a SOFA, provided that the claimant is a proper party claimant under the SOFA. DA Pam 27-162, paragraph 2-15c sets forth the rules applicable in particular countries. A SOFA provides an exclusive remedy subject to waiver as set forth in § 536.76(h) of this part.

(2) Single-service jurisdiction is established for all foreign countries in which a SOFA is in effect and for certain other countries. A list of these countries is posted on the USARCS Web site; for the address see § 536.2(a). Claims will be processed by the service exercising single-service responsibility. In the United States, USARCS is the receiving State office and all SOFA claims should be forwarded immediately to USARCS for action. Appropriate investigation under subpart B of this part procedures is required of an ACO or a CPO under USARCS' direction.

(d) *Foreign Claims Act claims.* (1) Claims by foreign inhabitants, arising in a foreign country, which are not cognizable under a SOFA, fall exclusively under the FCA. The determination as to whether a claimant is a foreign inhabitant is governed by the rules set out in subpart C and subpart J of this part. In case of doubt, this determination must be based on information obtained from the claimant and others, particularly where the claimant is a former U.S. service member or a U.S. citizen residing in a foreign country.

(2) Tort claims will be processed by the armed service that exercises single-service responsibility. When requested, the Commander USARCS may furnish a Judge Advocate or civilian attorney to serve as a Foreign Claims Commission (FCC) for another service. With the concurrence of the Commander USARCS, Army JAs may be appointed as members of another department's foreign claims commissions. See subpart J of this part. The FCA permits compensation for damages caused by "out-of-scope" tortious conduct of Soldier and civilian employees. Many of these claims are also compensable under Article 139, Uniform Code of Military Justice. See DA Pam 27-162, chap. 9. To avoid the double payment of claims, ACOs and CPOs must promptly notify the Command Claims Service of each approved Article 139 claim involving a claimant who could also file under an applicable SOFA.

(e) *National Guard Claims Act claims.* (1) Claims attributed to the acts or omissions of ARNG personnel in the course of employment fall into the cat-

egories set forth in subpart F of this part.

(2) An ACO will establish with a state claims office routine procedures for the disposition of claims, designed to ensure that the United States and state authorities do not issue conflicting instructions for processing claims. The procedures will require personnel to advise the claimant of any remedy against the state or its insurer.

(i) Where the claim arises out of the act or omission of a member of the ARNG or a person employed under 32 U.S.C. 709, it must be determined whether the employee is acting on behalf of the state or the United States. For example, an ARNG pilot employed under section 709 may be flying on a state mission, federal mission, or both, on the same trip. This determination will control the disposition of the claim. If agreement with the concerned state cannot be reached and the claim is otherwise payable, efforts may be made to enter into a sharing agreement with the state concerned. The following procedures are required in the event there is a remedy against the state and the state refuses to pay or the state maintains insurance coverage and the claimant has filed an administrative claim against the United States. First, forward the file and the tort claim memorandum, including information on the status of any judicial or administrative action the claimant has taken against the state or its insurer to the Commander USARCS. Upon receipt, the Commander USARCS will determine whether to require the claimant to exhaust his or her remedy against the state or its insurer or whether the claim against the United States can be settled without requiring such exhaustion. If the Commander USARCS decides to follow the latter course of action, he or she will also determine whether to obtain an assignment of the claim against the state or its insurer and whether to initiate recovery action to obtain contribution or indemnification. The state or its insurer will be given appropriate notification in accordance with state law.

(ii) If an administrative claim remedy exists under state law or the state maintains liability insurance, the Commander USARCS or an ACO acting

upon the Commander USARCS' approval may enter into a sharing agreement covering payment of future claims. The purpose of such an agreement is to determine in advance whether the state or the DA is responsible for processing a claim (did the claim arise from a federal or state mission?), to expedite payment in meritorious claims, and to preclude double recovery by a claimant.

(f) *Third-party claims involving an independent contractor*—(1) *Generally*. (i) Upon receipt, all claims will be examined to determine whether a contractor of the United States is the tortfeasor. If so, the claimant or legal representative will be notified of the name and address of the contractor and further advised that the United States is not responsible for the acts or omissions of an independent contractor. This will be done prior to any determination as to the contractor's degree of culpability as compared to that of the United States.

(ii) If, upon investigation, the damage is considered to be primarily due to the contractor's fault or negligence, the claim will be referred to the contractor or the contractor's insurance carrier for settlement and the claimant will be so advised.

(iii) Health care providers hired under personal services contracts under the provisions of 10 U.S.C. 1089 are not considered to be independent contractors but employees of the United States for tort claims purposes.

(2) *Claims for injury or death of contractor employees*. Upon receipt of a claim for injury or death of a contractor employee, a copy of the portions of the contract applicable to claims and workers' compensation will be obtained, either through the contracting office or from the contractor. Claims personnel must find out the status of any claim for workers' compensation benefits as well as whether the United States paid the premiums. The goal is to involve the contractor in any settlement, where indicated, in the manner set forth in DA Pam 27-162, paragraphs 2-15f and 2-61. In claims arising in foreign countries consider whether the claim is covered by the Defense Bases Act, 42 U.S.C. 1651-1654.

(g) *Claims by contractors for damage to or loss of their property during the performance of their contracts*. Claims by contractors for property damage or loss should be referred to the contracting officer for determination as to whether the claim is payable under the contract. Such a claim is not payable under the FTCA where the damage results from an in-scope act or omission. Contract appeal procedures must be exhausted prior to consideration as a bailment under the MCA or FCA.

(h) *Maritime claims*. Maritime torts are excluded from consideration under the FTCA. The various maritime statutes are exclusive remedies within the United States and its territorial waters. Maritime statutes include the Army Maritime Claims Settlement Act (AMCSA), 10 U.S.C. 4801, 4802 and 4806, the Suits in Admiralty Act (SIAA), 46 U.S.C. app. 781-790, the Public Vessels Act (PVA), 46 U.S.C. app. 781-790, and the Admiralty Extension Act (AEA), 46 U.S.C. app. 740. Within the U.S. and its territorial waters, maritime suits may be filed under the SIAA or the PVA without first filing an administrative claim, except where administrative filing is required by the AEA. Administrative claims may also be filed under the AMCSA. In any administrative claim brought under the AMCSA, all action must be completed not later than two years from its accrual date or the SOL will expire. Outside the United States, a maritime tort may be brought under the MCA or FCA as well as the AMCSA. The body of water on which it occurs must be navigable and a maritime nexus must exist. Once a maritime claim is identified, give the claimant written notice of the two-year filing requirement. In case of doubt, the ACO or CPO should discuss the matter with the appropriate AAO. Even when the claimant does not believe that a maritime claim is involved, provide the claimant with precautionary notice. See DA Pam 27-162, paragraphs 2-7e and 8-6.

(i) *Postal claims*. See also DA Pam 27-162, paragraphs 2-15i, 2-30 and 2-56g discussing postal claims.

(1) Claims by the U.S. Postal Service for funds and stock are adjudicated by USARCS with assistance from the Military Postal Service Agency and the

ACO or CPO having jurisdiction over the particular Army post office, when directed by USARCS to assist in the investigation of the claim.

(2) Claims for loss of registered and insured mail are processed under subpart C of this part by the ACO or CPO having jurisdiction over the particular Army post office.

(3) Claims for loss of, or damage to, parcels delivered by United Parcel Service (UPS) are the responsibility of UPS.

(j) *Blast damage claims.* After completing an investigation and prior to final action, all blast damage claims resulting from Army firing and demolition activities must be forwarded to the Commander USARCS for technical review. The sole exception to this rule is when a similar claim is filed citing the same time, place and type of damage as one which has already received technical review. See also DA Pam 27-162, paragraph 2-28.

(k) *Motor vehicle damage claims arising from the use of non-governmental vehicles.* See also § 536.60 (splitting property damage and personal injury claims) and DA Pam 27-162, paragraphs 2-15k (determining the correct statute), 2-61 (joint tortfeasors), and 2-62e (indemnity or contribution).

(1) *Government tortfeasors.* A Soldier or U.S. government civilian employee who negligently damages his or her personal property while acting within the scope of employment is not a proper claimant for damage to that property.

(2) *Claims by lessors for damage to rental vehicles.* Third-party claims arising from the use of rental vehicles will be processed in the same manner as NAFI commercially insured activities after exhaustion of any other remedy under the Government Travel Card Program or the Surface Deployment and Distribution Command Car Rental Agreement.

(3) *Third-party damages arising from the use of privately owned vehicles.* Third-party tort claims arising within the United States from a Soldier's use of a privately owned vehicle (POV) while allegedly within the scope of employment must be forwarded to the Commander USARCS for review and consultation before final action. The

claim will be investigated and any authorization for use ascertained including payment for mileage. A copy of the Soldier's POV insurance policy will be obtained prior to forwarding. If the DA is an additional insurer under applicable state law, the claim will be forwarded to the Soldier's liability carrier for payment. When the tort claim arises in a foreign country, follow the provisions of subpart J of this part.

(l) *Claims arising from gratuitous use of DOD or Army vehicles, equipment or facilities.*

(1) Before the commencement of any event that involves the use of DOD or Army land, vehicles, equipment or Army personnel for community activities, the Command involved should be advised to first determine and weigh the risk to potential third-party claimants against the benefits to the DOD or the Army. Where such risk is excessive, try to obtain an agreement from the sponsoring civilian organization holding the Army harmless. When feasible, third-party liability insurance may be required from the sponsor and the United States added to the policy as a third-party insured.

(2) When Army equipment and personnel are used for debris removal relief pursuant to the Federal Disaster Relief Act, 42 U.S.C. 5173, the state is required to assume responsibility for third-party claims. The senior judge advocate for a task force engaged in such relief should obtain an agreement requiring the state to hold the Army harmless and establish a procedure for payment by the state. Claims will be received, entered into the TSCA database, investigated and forwarded to state authorities for action.

(m) *Real estate claims.* Claims for rent, damage, or other payments involving the acquisition, use, possession or disposition of real property or interests therein, are generally payable under AR 405-15. These claims are handled by the Real Estate Claims Office in the appropriate COE District or a special office created for a deployment. Directorate of Real Estate, Office of the Chief of Engineers, has supervisory authority. Claims for damage to real property and incidental personal property, but not for rent (for example, claims arising during a maneuver or

deployment) may be payable under subparts C or J of this part. However, priority should be given to the use of AR 405-15 as it is more flexible and expeditious. In contingency operations and deployments, there is a large potential for overlap between contractual property damage claims and noncombat activity/maneuver claims. Investigate carefully to ensure the claim is in the proper channel (claims or real estate), that it is fairly settled, and that the claimant does not receive a double payment. For additional guidance, see subpart J of this part and United States Army Claims Service Europe (USACSEUR) Real Estate/Office of the Judge Advocate Standard Operating Procedures for Processing Claims Involving Real Estate During Contingency Operations (August 20, 2002).

(n) *Claims generated by civil works projects.* Civil works projects claims arising from tortious activities are defined by whether the negligent or wrongful act or omission arising from a project or activity is funded by a civil works appropriation. Civil works claims are those noncontractual claims which arise from a negligent or wrongful act or omission during the performance of a project or activity funded by civil works appropriations as distinguished from a project or activity funded by Army operation and maintenance funds. Civil works claims are paid out of civil works appropriations to the extent set forth in § 536.71(f). A civil works claim can also arise out of a noncombat activity, for example, an inverse condemnation claim in which flooding exceeds the high water mark. Maritime claims under subpart H of this part are civil works claims when they arise out of the operation of a dam, locks or navigational aid.

NOTE TO § 536.34: See parallel discussion at DA Pam 27-162, paragraph 2-1.

#### **§ 536.35 Unique issues related to environmental claims.**

Claims for property damage, personal injury, or death arising in the United States based on contamination by toxic substances found in the air or the ground must be reported by USARCS to the Environmental Law Division of the Army Litigation Center and the Environmental Torts Branch of DOJ.

Such claims arising overseas must be reported to the Command Claims Service with geographical jurisdiction over the claim and USARCS. Claims for personal injury from contamination frequently arise at an area that is the subject of claims for cleanup of the contamination site. The cleanup claims involve other Army agencies, use of separate funds, and prolonged investigation. Administrative settlement is not usually feasible because settlement of property damage claims must cover all damages, including personal injury. Payment by Defense Environmental Rehabilitation Funds should be considered initially and any such payment should be deducted from any settlement under AR 27-20.

#### **§ 536.36 Related remedies.**

An ACO or a CPO routinely receives claims or inquiries about claims that clearly are not cognizable under this part. It is the DA's policy that every effort be made to discover another remedy and inform the inquirer as to its nature. Claims personnel will familiarize themselves with the remedies set forth in DA Pam 27-162, paragraph 2-17, to carry out this policy. If no appropriate remedy can be discovered, forward the file to the Commander USARCS, with recommendations.

#### **§ 536.37 Importance of the claims investigation.**

Prompt and thorough investigation will be conducted on all potential and actual claims for and against the government. Evidence developed during an investigation provides the basis for every subsequent step in the administrative settlement of a claim or in the pursuit of a lawsuit. Claims personnel must gather and record adverse as well as favorable information. The CJA, claims attorney or unit claims officer must preserve their legal and factual findings.

#### **§ 536.38 Elements of the investigation.**

(a) The investigation is conducted to ascertain the facts of an incident. Which facts are relevant often depends on the law and regulations applicable to the conduct of the parties involved but generally the investigation should develop definitive answers to such